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October 9, 2018
Via facsimile and U.S. Mail

Elizabeth A. Brown
Clerk of The Supreme Court
201 South Carson Street
Carson City, Nevada 89701

ADKT 0522

RE: NRCP amendments

Dear Ms. Brown;

These are written comments on the proposed amendments to the NRCP. This letter asks the Committee review the purpose and impetus of the NRCP *as it relates to family law*; it asks the Committee make Rules which drive prompt and complete disclosure, and not abide delay or inexact responses. **I would like to speak at the public hearing scheduled October 19, 2018, in Carson City.**

This letter is also a "thank you" for your year of hard work and attention to this task.

I. The Rules and family law. For most Nevadans, the only contact they will ever have with the judicial system is in a divorce, custody, or adoption setting. This *is* the justice system to most of our citizens. I submit the courts must carefully manifest to the public "the system" knows what it is doing, and resolves matters quickly, fairly, and inexpensively. It must manifest to the public the system is nimble and sensible. The public's belief in the efficacy and fairness of the courts is all our system (and this democracy) really has.

II. Historical paradox. The Federal Rules engendered our Rules. The Federal Rules were designed for federal litigation: securities and corporate cases, complex commercial matters, antitrust and restraint-of-trade cases, and similar, difficult matters, handled by (mostly) Wall Street firms. Further, the federal courts for which the Rules were designed would not entertain a family law case and were hostile to family law matters.

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Federal litigation was (and, is) entirely different from a divorce or custody matter in several ways: (1) the parties are real people, not corporations run by managers; (2) fees are not deductible; (3) fees are often a zero sum game—litigation over custody or school tuition?; and, (4) the level of care and interest are, well, *heightened.*

The matrimonial case has been engrafted on to a procedural system for which it was not originally designed. The NRCP has adapted to the growth of family law, but I submit it is helpful to recall the Rules were not designed for an area of the law that is profoundly different than all other legal specialties and topics. It is with that awareness I request the Committee its product.

III. The basic approach. The bedrock notion of the Rules is "ask and they must tell." It is respectfully submitted the engine which drives the Rules in family law *should* be "immediately tell in detail, then answer any further questions." Rule 16.2 does that...when it is enforced. It needs support from the other Rules (see below regarding fact pleading), and from the judges.

The Rules should command mandatory, complete, forthright disclosure in all regards. "Ask then tell" is time-consuming and expensive; "tell up-front and tell some more" is more the more effective way to resolution.

IV. On four issues, require fact pleading and reject notice pleading. Notice pleading in Nevada is already bound by this rule: "Complaint must set forth sufficient facts to establish all necessary elements of claim for relief so that adverse party has adequate notice of nature of claim and relief sought." Hay v. Hay, 100 Nev. 196, 197 (1984). In family law cases, the Rules should require specific, fact pleading.

I respectfully request the pleading Rules be amended to require the claimant set forth what they claim and why they are entitled to it. Do not require a party send a bleating missive which asks, "Are you claiming there is separate property in this marital estate? And, if so, what it is? Where is it? On what factual basis do you claim it is separate?" I submit the onus should be on the party who makes the claim to state it in a coherent way, which will thus hone the issues and reduce (or narrow) discovery.

Suggested amendment: ***(a) Claims for Relief.*** *A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded. Where a claimant seeks damages of more than $15,000, the demand shall be for damages "in*

excess of $15,000" without further specification of amount. ***In any case brought under Title 11 of the Nevada Revised Statutes, a claim for (i)separate property,(ii) waste or breach of a fiduciary duty, (iii) reimbursement, or (iv) custody of a minor child, shall affirmatively set forth the factual basis of such claim, including why such claim is in the best interest of the child.***

Specific pleadings should be required in the areas set forth below:

A. Separate or community property claims. Claims that community property has been contributed to separate property or separate property contributed to joint or community property. These would also be claims under NRS 125.150 and Malmquist. While the FDF has categories for separate property, they are almost never completed. A prose statement of the claims should be mandatory.

B. Waste. Waste is, essentially, a breach-of-fiduciary-duty claim. It is fraud. Current legal analysis of the claim is unclear (at best), but the Rules can require any colorable claim under whatever theory there may be, to be pleaded with specificity. Fraud must be pleaded affirmatively and specifically, but it will help if the procedural rules require it in waste cases.

C. Hay/Michoff cases. These are cases where one of an unmarried couple claims a contract between them or claims they formed a partnership. The substantive law cited above requires fact pleading, but it will greatly help if the Rules also required such pleading. Given the falling marriage rates and increasing cohabitation rates, this is a material area of concern.

D. Custody. Require a party seeking custody to explicitly set forth the factual basis for their custody claim, e.g., joint or primary. Require a party state why such a claim is in the child's best interest. Require that parents put on the record why they want what they want, and why it is good for their children. (None will likely ever tell the truth and say "...to reduce my child support," but at least the pretext will be on the record.) Once a lawyer knows the basis of a custody claim, they can deal with it infinitely more efficiently.

V. Revise the standard Financial Declaration Form (FDF); severely penalize parties who do not submit them timely or in good faith.

A. Important. The FDF drives all that goes before it—interim and permanent child and spousal support, property division, and discovery. It is the configuration, the outline of the case. If it is slipshod, haphazard, incomplete, or unfiled, the other side is

greatly disadvantaged in dealing with interim claims and in shaping their approach to the case. Without an FDF or if it is delayed, there is little hope for any efficient way to handle the case.

B. A timely and complete FDF permits an intelligent, *proportionate* approach to substantive claims *and* discovery. When one party knows the other's claims of assets, debts, income, and expenses, that party can make reasonable claims and proportionate discovery requests. It may also lead to early resolution—in fact, it does.

C. Revision of the Financial Declaration Form. If war is too important to be left to the generals, perhaps financial declaration forms are too important to be left to the lawyers...at least, initially. The current form is difficult to use, deceptive in the wrong hands, erroneous in even the right hands, and often not very informative. I believe this firm has had a hand in its drafting and *we* are not very happy with the result.

I respectfully suggest the Committee hire the forensic experts who appear in our courts statewide (including Messrs. Boone, DiPietro, and Ms. Salazar in the North, with other forensic experts in the South), and *pay* them to draft a simple, informative form *which transfers information efficiently and completely.* (Perhaps two forms should be devised: simple and complex.)

Do not stint—demand and *pay for* the full attention of the experts. First, permit the accounting professionals to think and draft, *then* give it to the judges and lawyers to review and shape.

D. Sanctions. The current scheme of sanctions is acceptable, but perhaps it makes no difference since the courts are reluctant to order them. I would revise the sanctions language as follows:

(1) Sanctions.

(A) Sanctions may include an order finding the violating party in civil contempt of court, an award of reasonable attorney fees and costs to the nonviolating party, and any other sanction the court deems just and proper;

(B) Sanctions may include an order awarding the omitted asset to the opposing party as his or her separate property or making another form of unequal division of community property, and/or any other sanction the court deems just and proper. These ~~discretionary~~ sanctions are encouraged ***to prevent*** *~~for~~ repeat or egregious violations.*

VI. Thank you for your attention to the important task you have undertaken. Your time is valuable and this devotion to the betterment of the law is appreciated. And, thank you for your attention to this letter.

Truly Yours,

SILVERMAN KATTELMAN SPRINGGATE, CHTD.

Gary R. Silverman